

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HARRY'S EXXON SERVICE STATION	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1979	:	
through August 31, 1982.	:	

Petitioner, Harry's Exxon Service Station, 18 Bradford Street, West Seneca, New York 14224, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through August 31, 1982 (File No. 801193).

A hearing was commenced before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 17, 1986 at 1:15 P.M. and was continued to conclusion on January 7, 1987 at 1:15 P.M., with all briefs to be submitted by April 7, 1987. Petitioner appeared by Paul J. Diviak, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales tax due from petitioner for the period at issue.

II. Whether certain consents which extended the period of limitation for assessment of sales tax were illegally obtained from petitioner by the Audit Division and, if so, the effect thereof on the assessment issued to petitioner.

III. Whether a letter advising petitioner that no additional sales tax was due for the audit period, issued subsequent to an assessment for said period, serves to estop the Audit Division from further administratively proceeding with the assessment, thereby cancelling the same.

FINDINGS OF FACT

1. On March 20, 1984, the Audit Division issued to Harry's Exxon Service Station (hereinafter "petitioner") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$10,503.00, plus penalty and interest, for a total amount due of \$17,480.49 for the period June 1, 1979 through August 31, 1982.

2. Consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law were executed by Harry J. Eckert, owner of petitioner, as follows:

<u>Date Executed</u>	<u>Taxable Period</u>	<u>Extension Date</u>
9/14/82	6/1/79-8/31/79	12/20/82
12/14/82	6/1/79-11/30/79	6/20/83
3/19/83	6/1/79-2/28/80	9/20/83
6/15/83	6/1/79-5/31/80	9/20/83
8/27/83	6/1/79-8/31/80	12/20/83
12/13/83	6/1/79-11/30/80	3/20/84

The consent which indicated that it had been signed by Harry J. Eckert on March 19, 1983 was actually signed on Monday, March 21, 1983.

3. A field audit of petitioner commenced in February 1982. Records for the sales tax quarter ending November 30, 1980 were requested from and provided by petitioner. These records consisted of sales tax returns and related worksheets, Federal and State income tax returns and worksheets, depreciation schedules, cash receipts and purchase journals, purchase invoices for tires, batteries and accessories, and cancelled checks. Records pertaining to gasoline purchases were not provided by petitioner. For this quarter, petitioner had reported gasoline sales of 41,303 gallons. The Audit Division thereupon obtained records from petitioner's supplier, Exxon Company, U.S.A. ("Exxon"), which indicated that petitioner had purchased 59,250 gallons for the quarter. The difference between the amount reported sold and the amount purchased (17,947 gallons) exceeded petitioner's storage capacity. The auditors then returned to the service station in an attempt to examine petitioner's records for additional sales tax quarters. However, a fire which occurred on February 28, 1982 had caused severe damage to the station

including the destruction of the remainder of petitioner's books and records which were stored on the premises.

4. On October 13, 1983, a Statement of Proposed Audit Adjustment was issued to petitioner in the amount of \$12,089.98 for the period at issue. Petitioner's gasoline purchases were obtained from Exxon and were marked up using the statewide average retail selling price contained in a Sales Tax District Office Audit Bureau memorandum dated December 7, 1982. For the period at issue, petitioner's gasoline purchases were determined to be 619,700 gallons. Subsequent to the issuance of the aforesaid Statement of Proposed Audit Adjustment, the Audit Division allowed petitioner a 10 percent pump loss for the period December 1, 1980 through November 30, 1981 which reduced gallons available for sale by 15,360. This pump loss allowance was based upon a letter from Rockelman & Henn, a pump repair company, which stated that such loss had occurred but had been corrected in the latter part of 1981. This allowance resulted in a reduction of tax due in the amount of \$1,586.93. Sales of tires, batteries, accessories and labor were obtained from petitioner's books for the quarter ending November 30, 1980 (\$2,973.00) and were projected throughout the entire audit period. Total taxable sales were, therefore, determined to be \$753,049.00 (\$714,400.00 gasoline sales + \$38,649.00 other sales). After giving petitioner credit for sales tax paid, additional tax in the amount of \$10,503.00 was determined to be due. Accordingly, on March 20, 1984, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$10,503.00, plus penalty and interest, for a total amount due of \$17,480.49.

5. Petitioner had two gasoline islands with three pumps on each island. One island was for self-service pumping, the other for full service. The pumps were of the older variety and were not equipped to handle sales when the price of gasoline rose to \$1.00 or more per gallon. To remedy this situation, petitioner's pumps were set at one-half of the actual price per gallon and signs were posted to alert customers that the amount due on gasoline purchases was actually twice the amount indicated on the pumps. Approximately \$15.00 per week was lost by petitioner due to self-service customers paying only the amount shown on the pumps.

6. Due to the fact that petitioner was prohibited by State law from having "hold-open" devices on its self-service pumps, i.e., devices which permit the customer to pump until full without holding onto the pump handle, approximately 25 gallons per month were spilled by customers who refused to pay for this spillage.

7. As indicated in Finding of Fact "5", supra, petitioner's pumps were of the older variety. The computers in the pumps were driven by an electric motor through a belt system which, because of the age thereof, caused calibration problems. A representative of the Bureau of Weights and Measures advised Harry J. Eckert that four of his six pumps were giving away approximately one gallon for every ten sold. This problem was not corrected until sometime after the audit period. For the period December 1, 1981 through August 31, 1982, petitioner's additional pump loss totalled 6,593 gallons (4 of 6 pumps or 2/3 of 98,900 gallons sold for the period = 65,934 x 10%).

8. On July 13, 1984, the Chief, Sales Tax Audit Section of the Buffalo District Office issued a letter to petitioner which advised that the audit had been completed for the period at issue and that no additional sales or use taxes were due. This letter was issued, in error, by a stenographer in the Sales Tax Section of the Buffalo District Office approximately four months after issuance to petitioner of the notice of determination and demand.

SUMMARY OF PETITIONER'S POSITION

9. Petitioner alleges that the consent extending the period of limitation for assessment which was dated March 19, 1983 was actually executed on March 21, 1983 and, as a result thereof, the statute of limitations for assessment of sales and use taxes for the period June 1, 1979 through February 28, 1980 had expired. Petitioner further alleges that other such consents had also been backdated at the insistence of the auditor.

10. Petitioner contends that the letter issued by the Chief, Sales Tax Audit Section of the Buffalo District Office on July 13, 1984, which advised that no additional sales or use taxes were due for the audit period serves to estop the Audit Division from further administratively proceeding with the assessment issued March 20, 1984. Petitioner alleges that, in reliance on

said letter, its accountant destroyed certain records, the production of which would have resulted in a substantial reduction in the assessment herein. The accountant admitted, however, that he did not prepare petitioner's sales tax returns but, instead, was involved only in the preparation of Harry J. Eckert's personal income tax returns.

CONCLUSIONS OF LAW

A. That Tax Law § 1147(c) provides, in pertinent part, as follows:

"Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period."

B. That Tax Law § 1147(a)(3) provides as follows:

"When the last day prescribed under authority of this article (including any extension of time) for performing any act falls on Saturday, Sunday or a legal holiday in the state of New York, the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday or legal holiday."

On December 14, 1982, petitioner, by Harry J. Eckert, executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through November 30, 1979 until June 20, 1983. It is clear from the evidence presented that the consent dated March 19, 1983, for the period June 1, 1979 through February 28, 1980, was actually executed on March 21, 1983, a date which, except for the provisions of Tax Law § 1147(a)(3), would be one day beyond the period for assessment only for the sales tax quarter ending February 28, 1980 since the prior consent included all quarters prior thereto. However, in 1983, since March 20th fell on a Sunday, the Audit Division could properly and did actually obtain said consent on the next succeeding day (March 21st). This consent was, therefore, properly obtained and the period for assessment for the sales tax quarters set forth thereon was extended until September 20, 1983. Later consents executed by Mr. Eckert extended the period for assessment until March 20, 1984, the date on which the notice of determination and demand was issued to petitioner. Petitioner's contention that other consents were backdated and/or illegally obtained is unsubstantiated by the evidence presented at the hearing held herein.

C. That "[p]ublic policy favors full and uninhibited enforcement of the Tax Law, and the general rule that estoppel cannot be employed against the State or governmental subdivision is particularly applicable with respect to the Tax Commission" (Turner Construction Company v. State Tax Commn., 57 AD2d 201, 203). Moreover, errors or misinterpretations by certain employees of the Department of Taxation and Finance are not binding on the Department (Matter of Jack W. Miller, Excavating Contractor, Inc., State Tax Commission, December 31, 1984, determination confirmed sub nom, Jack W. Miller, Excavating Contractor, Inc. v. State Tax Commn., 516 NYS2d 352). Petitioner's allegation that, in reliance on the letter dated July 13, 1984 from the Chief, Sales Tax Audit Section of the Buffalo District Office, certain records possessed by its accountant were destroyed is unsubstantiated. The accountant admitted that he did not prepare or assist in the preparation of petitioner's sales tax returns. In addition, these records were never presented to the Audit Division at any time prior to the issuance of the assessment on March 20, 1984, a date which preceded the issuance of the aforesaid erroneously issued letter by approximately four months.

D. That Tax Law § 1135(a) requires every person required to collect sales tax to keep records of every sale and of the tax payable thereon. "Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law § 1135[a]). Tax Law § 1138(a) provides that if a sales tax return "is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices...." "When records are not provided or are incomplete and insufficient, it is [the Tax Commission's] duty to select a method reasonably calculated to reflect the taxes due. The burden then rests upon the taxpayer to demonstrate...that the method of audit or the amount of the tax assessed was erroneous" (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858 [citations omitted]). Since petitioner was unable to provide the Audit Division with adequate books and records for the entire audit period and since the Audit Division's verification of petitioner's purchases from its supplier indicated underreporting of sales, the Audit Division's

reliance on external indices was proper and petitioner has failed to sustain its burden of proving that the audit method employed was erroneous.

E. That, as indicated in Findings of Fact "5", "6" and "7", supra, petitioner's taxable sales are to be reduced by \$15.00 per week for the entire audit period due to its customers' failure to pay proper amounts on self-service gasoline purchases, its gasoline sales are to be further reduced by 25 gallons per month for the entire audit period due to spillage and it is to receive an additional pump loss of 6,593 gallons for the period December 1, 1981 through August 31, 1982 due to pump malfunctions.

F. That the petition of Harry's Exxon Service Station is granted only to the extent indicated in Conclusion of Law "E"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1984 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
January 22, 1988

ADMINISTRATIVE LAW JUDGE